for investments, as in the cases at bar. A discriminatory tax on a commercial ***transaction*** directly modifies the ***price*** of the product or service being sold. The tax makes interstate goods more expensive in comparison to competing intrastate goods by directly increasing the price of the interstate good or, when a credit is given, through the equivalent economic effect of reducing the price of the intrastate good or service.

But an ***investment*** credit against an income tax does not necessarily shift the price of the product or service in a significant way. Rather, the charge for an investment is a ***cost input*** that is merely one component of the end price ultimately charged to consumers, and the credit affects only that input cost.

The attenuated impact of income tax credits is demonstrated by the facts of the Ohio measure in question here. Daimler Chrysler and other automobile manufacturers compete in a nationwide market for cars and car parts. Because the Ohio credit is not tethered to any specific sales transaction, and its economic effects are spread across the entirety of Daimler Chrysler's business operations, the tax credit does not translate into a direct competitive advantage for Daimler Chrysler either in Ohio or nationwide. Indeed, if every state adopted an investment tax credit equivalent to Ohio's, there would be no impact on interstate commerce at all. This is, in part, why numerous studies have determined that investment incentives often do not have a measurable impact on companies' decisions where to locate their facilities.[3]

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3. *See, e.g.*, Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447, 479 (1997); Peter D. Enrich, *Saving the States from Themselves:*

(Cont'd)

The effect on interstate commerce is further attenuated by who it affects. If a manufacturer pays reduced corporate income taxes in Ohio for new investments in that state, the other corporations who end up paying relatively higher Ohio income taxes will include both Ohio and foreign corporations—and both businesses that sell predominantly in the interstate market and those that cater to an exclusively Ohioan clientele. As a result, the ultimate economic impact of the Ohio tax credit is not necessarily to "provid[e] a direct commercial advantage to local business." *Boston Stock Exch.*, 429 U.S. at 329 (*citing Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).[4]

In contrast, credits against transactional taxes (such as sales taxes) do directly favor economic activity performed in the state over out-of-state economic activity. The company making an investment within the state receives a localized

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(Cont'd)

Commerce Clause Constraints on State Tax Incentives for Business, 110 HARV. L. REV. 377, 383-86, 397-98 (1996); Ivan C. Dale, Comment, *Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247, 247 (2002).

4. Thus, Ohio's investment incentive does not have the "coercive" effect that commentators have identified of "not only" funneling an intrastate activity into Ohio, "but, in addition," encouraging the "corporation [to] conduct its business in [the state]." Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413, 440 n.123 (1997). Rather, because the investment targeted by Ohio law *can only occur locally*, the Ohio law "merely lowers the cost of doing business in intrastate commerce." *Id.* It does not "discourage . . . corporations from plying their trades in interstate commerce." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996).

cost advantage in retail sales over its out-of-state rivals. The effect is precisely the same as the "paradigmatic example" of a discriminatory law—"the protective tariff or customs duty" that penalizes out-of-state activity by "tax[ing] goods imported from other States, but . . . not tax[ing] similar products produced in State." *West Lynn Creamery*, 512 U.S. at 193. Such tariff-like taxes have the most serious distorting effects on free markets, because they directly eliminate the cost advantages of more efficient out-of-state sellers. *See, e.g., id.* at 194. Thus, credits against sales or other transactional taxes violate a cardinal rule of Commerce Clause jurisprudence—that "'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *American Trucking Ass'ns v. Schneiner*, 483 U.S. 266, 280 (1987) (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)).

The tax credits and exemptions granted to cable television companies are a classic example of this "rampart of customs duties." *Baldwin v. G.A.F. Seelig*, 294 U.S. at 527. Cable providers distribute television programming directly to their customers by means of in-state cable networks laid along local rights-of-way, for which they are required to pay franchise fees to local governments. Their tax credits and exemptions reflect this in-state presence requiring cable companies to obtain franchises from local governments in order to access public rights-of-way. By comparison, satellite television distributors do not need access to local rights-of-way, because they transmit television signals directly from the satellite to the consumer's residence. Accordingly, they do not obtain local franchises and do not pay franchise fees. The effect of the cable tax credit or exemption is to eliminate this cost advantage of satellite television operators. State tax laws that compensate local businesses for their cost

disadvantages by imposing higher taxes on out-of-state rivals are a classic form of prohibited protectionism. *See, e.g., Bacchus Imports*, 468 U.S. at 272; *West Lynn Creamery*, 512 U.S. at 194.

CONCLUSION

There should be a two-step analysis of state tax credits or exemptions justified as designed to attract in-state investment. First, a tax must genuinely have been intended to attract in-state investment and not to protect in-state businesses or economic activity from out-of-state competition. Second, a state may not seek to attract local investment through the use of credits or exemptions from transactional taxes that provide a direct commercial advantage to in-state commerce.

Respectfully submitted,

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Petitioners,
v.
CHARLOTTE CUNO, *ET AL.*,
Respondents.

WILLIAM W. WILKINS, TAX COMM'R FOR THE STATE OF OHIO, *ET AL.*,
Petitioners,
v.
CHARLOTTE CUNO, *ET AL.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* ECONOMICS AND PUBLIC POLICY PROFESSORS RANDY ALBELDA, HOWARD CHERNICK, PETER FISHER, ROBERT LYNCH, THOMAS MALONEY, ANN MARKUSEN, DICK NETZER, ROBERT REICH, ANDREW RESCHOVSKY, JOHN SOLOW, KENNETH THOMAS, AND JOHN YINGER IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTERESTS OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. AN ANALYSIS OF THE ECONOMIC IMPACT OF STATE TAX INCENTIVES IS RELEVANT TO THE CONSTITUTIONAL ISSUE AT STAKE	3
II. THE ECONOMIC EVIDENCE SHOWS THAT STATE TAX INCENTIVES, AT BEST, PRODUCE A ZERO-SUM COMPETITION AND, AT WORST, RESULT IN A NATIONAL ECONOMIC LOSS	8
A. Tax incentive competition is at best a zero-sum game	8
B. Tax incentive competition produces economic inefficiency	10
C. Tax incentive competition harms long-term economic growth	13
D. Tax incentive competition does not enhance international competitiveness	14
III. STATE TAX INCENTIVES DO NOT PRODUCE MEANINGFUL INTRASTATE ECONOMIC BENEFITS THAT JUSTIFY THEIR HARMFUL INTERSTATE EFFECTS	15
A. Tax incentives are at best marginally effective in altering business locations	16
B. Tax incentives are costly	22

TABLE OF CONTENTS – Continued

Page

C. Tax incentives are an inferior policy tool given the alternative strategies available to encourage economic development 22

D. Incentive strategies are adopted for political, not economic, reasons 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTERESTS OF THE *AMICI CURIAE*

Amici are distinguished economics and public policy scholars with long histories of academic research and public policy engagement in the field of tax policy and economic development.[1] A list of the *amici* and brief biographical information are attached in the addendum to this brief. *Amici* are interested in this matter based on their professional and public concern that state tax incentives like the Ohio investment tax credit at issue in this case produce wasteful interstate tax competitions that harm the national economy. They are filing this brief because they believe that the negative economic consequences that stem from tax incentives weigh in favor of declaring the Ohio investment tax credit unconstitutional.

SUMMARY OF ARGUMENT

1. The purpose of the Court's dormant Commerce Clause jurisprudence is to prevent states from enacting tax policies designed to improve their own economic positions at the expense of the national marketplace. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). Toward this end, the Court has repeatedly held that state policies that preference in-state business activity in a manner that

[1] This *amici curiae* brief in support of the briefs of the Respondents is submitted pursuant to Rule 37 of the Supreme Court Rules. The parties have consented to the filing of briefs *amicus curiae* and have filed blanket consent letters with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief was not authored in whole or in part by counsel for a party and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

harms out-of-state competitors improperly infringe on the federal government's core authority to regulate commerce. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981). Because of the Court's role as arbiter of disputes over interstate commerce, it has grown increasingly attuned to the practical economic effects of state policies. *See, e.g., American Trucking Assocs., Inc. v. Michigan Public Serv. Comm.*, 125 S.Ct. 2419 (2005). Following the Court's lead, *amici* believe that an empirical analysis of the economic and public policy impact of state tax incentives like the Ohio investment tax credit (ITC) on interstate commerce would illuminate the Court's constitutional analysis in this case.

2. What the empirical evidence shows is that state tax incentives like the Ohio ITC do, in fact, have substantial negative consequences for interstate commerce. Competition among the states for business activity through the offering of such state tax incentives is largely a zero-sum game in that economic gains to the state that enacts tax incentives are offset by losses to other states. Moreover, tax incentive competition has an overall negative effect on the national economy by producing business location decisions that are either economically inefficient (because firms do not locate in states with the lowest real costs of production) or wasteful (in that firms are given incentives to locate in states where they would go anyway). Finally, by fostering a "race to the bottom" in which states must continually increase tax incentives in order to lure businesses, tax incentive competition undermines the ability of state and local government to finance the investments in public education and infrastructure that provide the foundation for future economic growth. Because these consequences are precisely the type of harms

that the Commerce Clause was designed to prevent, *amici* believe that they provide support for the Sixth Circuit's conclusion that the Ohio ITC impedes interstate commerce in violation of the Constitution.

3. This harm to the national economy, moreover, is not offset by gains to the states engaging in incentive competition. Indeed, the local economic benefits claimed by advocates of such policies are negligible and, to the extent that they do exist, could be accomplished by alternative state polices that do not harm the national economy. In particular, the general conclusion based on extensive research on state tax incentives is that incentives are, at best, only marginally effective in changing the location of business activity. And even when they do, it is at the expense of spending on local infrastructure (education, utilities, transportation) that undercuts long-term growth. Because state investments in workforce development, technology, education, and public infrastructure are viable alternative means of enhancing state economic growth, tax incentives like Ohio's ITC can only be viewed as costly, inefficient policies.

ARGUMENT

I. AN ANALYSIS OF THE ECONOMIC IMPACT OF STATE TAX INCENTIVES IS RELEVANT TO THE CONSTITUTIONAL ISSUE AT STAKE

The Court's Commerce Clause jurisprudence is rooted in a fundamental concern about the destructive impact of certain types of state economic regulation on the national economic welfare. Though the Commerce Clause itself – which confers upon Congress the "Power . . . To regulate

Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3 – imposes no explicit limitation on the power of the states over their own economic activity, it has long been interpreted as providing an essential bulwark against self-interested state policies that injure the national market. Indeed, the inclusion of the Commerce Clause in the Constitution reflected

> the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325 (1979). In order to protect against such "Balkanization," the Court has, through the "dormant" or "negative" aspect of the Commerce Clause, sought for nearly two hundred years to protect interstate economic activity by rooting out discriminatory state regulation. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994). Thus, even though the Commerce Clause itself is simply a grant of regulatory power to the federal government, what the "dormant" Commerce Clause jurisprudence stands for is the principle that the individual states may not usurp the federal role by enacting their own regulations that impede interstate commerce.

The paradigmatic violation of the dormant Commerce Clause is when a state imposes a tariff on goods imported from other states that is not imposed on in-state goods. *See West Lynn Creamery*, 512 U.S. at 193. However, the Court has made it clear that this paradigm does not exhaust the situations in which state regulation of economic activity will constitute a violation of the Commerce Clause. To the contrary, the Court has affirmed that state regulation that

preferences in-state economic actors to the detriment of their out-of-state counterparts is equally suspect from a constitutional perspective. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (holding that an ethanol tax credit limited to ethanol produced in Ohio or in a state with a similar tax credit provision violated the Commerce Clause principle of nondiscrimination); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (striking down New York tax credit for export-oriented corporations based on the proportion of New York business activity); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (invalidating a Hawaii state law exemption on liquor tax for locally produced alcoholic beverages); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (striking down a Louisiana tax scheme that provided tax credits solely to in-state producers of natural resources); *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977) (holding that a New York statute that reduced the tax on in-state stock transfers in order to prevent the loss of stock trades from the New York Stock Exchange violated the Commerce Clause).

It is the concern with the detrimental impact of preferential state regulation on interstate commerce that lies at the heart of the Court's examination of the Ohio investment tax credit (ITC) at issue in this case. *See* Ohio Rev. Code Ann. §§ 5733.33(C)(1), (C)(2).[2] The key question before the Court is whether the ITC – which was given to DaimlerChrysler to construct a new vehicle-assembly plant in Toledo – constitutes economic discrimination in violation of the Commerce Clause.

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[2] We note that the Ohio tax credit in its general outlines is similar to the type of investment tax credits currently in place in 38 states. *See* COMMERCE CLEARING HOUSE, 2005 STATE TAX HANDBOOK 275-80 (2005).